APPEAL NO. 92124
FILED MAY 11, 1992

On February 19, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held pursuant to the applicable provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq*. (Vernon Supp. 1992) (1989 Act). The hearing officer made findings of fact and conclusions of law which included a finding that a binding agreement was reached (between the appellant and respondent) at the benefit review conference held on October 21, 1991, and a conclusion that appellant does not have good cause for failing to abide by that agreement. He ordered appellant to abide by its agreement as well as an Interlocutory Order entered on December 19, 1991. He also ordered appellant to pay medical benefits and income benefits pursuant to his order, and in keeping with the agreement and the Interlocutory Order.

Appellant challenges all of the hearing officer's findings and conclusions, some on the basis that there is no evidence to support them and that they pertain to matters not before the hearing officer, and others on the basis that they are contrary to the evidence. Appellant also asserts that the 1989 Act is unconstitutional. Appellant further contends that the hearing officer erred in allowing the discovery of two documents over its objection that they were privileged under the attorney-client communication privilege and that the hearing officer was without jurisdiction to release the documents, without first affording appellant the opportunity for appellate review of the decision to permit discovery of the documents. Appellant further contends that there is no evidence to support certain statements made by the hearing officer in his "Statement of the Case" and "Discussion of the Evidence."

Respondent contends that the hearing officer did not abuse his discretion in determining appellant did not have good cause for failing to abide by its agreement; that the hearing officer had authority to rule on the discovery matter; that appellant waived any error on the discovery matter by failing to request a continuance to seek appellate review prior to release of the documents; and, that appellant is precluded from raising for the first time on appeal issues on the constitutionality of the 1989 Act.

DECISION

The hearing officer's decision is affirmed.

We do not address appellant's contention that the 1989 Act is unconstitutional. Administrative agencies have no power to determine the constitutionality of statutes. Texas State Board of Pharmacy v. Walgreen Texas Co., 520 S.W.2d 845- 848 (Tex. Civ. App.-Austin 1975, writ ref'd n.r.e.). We take official notice that the constitutionality of the 1989 Act is now under judicial review in Texas Workers' Compensation Commission *et al*. v. Hector Garcia *et al*. (In the Court of Appeals for the Fourth Supreme Judicial District at San Antonio, Texas-No. 04-91-00565-CV).

Appellant has totally failed to demonstrate, or even argue, how the hearing officer's

decision to permit the discovery of one letter from appellant's former attorney to appellant's adjusting firm dated October 23, 1991, and another letter from one of appellant's current attorney's to the same adjusting firm dated December 17, 1991, both of which were admitted into evidence after an *in camera* review by the hearing officer, constituted reversible error. Appellant argues only that "[t]he release of these two letters to claimant's counsel and the introduction of these two letters into evidence unconstitutionally denied the carrier its right to counsel and due process." To obtain reversal of a judgment based upon error of the trial court in admission or exclusion of evidence, the complaining party must first show that the trial court's determination was in fact error, and second, that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). Reversible error is not ordinarily shown in connection with rulings on questions of evidence unless the whole case turns on the particular evidence admitted or excluded. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). *See also* Texas Workers' Compensation Commission Appeal No. 91064 (Docket No. HO-A086991-01-CC-HO41) decided December 12, 1991. In 31 TEX. JUR. 3rd *Discovery and Depositions* §4 (1984) it is stated that: "[o]n appeal, the doctrine of harmless error applies to rulings on motions for discovery. Also, although the trial judge erred in his ruling on the admissibility of a deposition, the ruling will not be reversed where no prejudice is shown." Thus, in the absence of any showing by appellant that error, if any, by the hearing officer in admitting the letters into evidence, was reasonably calculated to cause and probably did cause rendition of an improper decision, we overrule appellant's contention.

Although not necessary to our decision, we make the following observations in regard to discovery matters. First, pursuant to Article 8308-6.33(f) and Tex. W. C. Comm'n, 28 TEX. ADMIN. CODE §142.13(f), the hearing officer has the authority, for good cause shown, to permit a party to conduct discovery in addition to that allowed under Article 8308-6.33(a). Second, the hearing officer has the authority to accept documents and other tangible evidence at the contested case hearing. Article 8308-6.34(a)(4). Third, the hearing officer has the authority to rule on requests, issue orders, and rule on the admissibility of evidence. Rule 142.2(2), (3), and (8). Fourth, although conformity to legal rules of evidence is not necessary at a contested case hearing (Article 8308-6.34(e), it is our opinion that the "lawyer-client privilege" as set forth in TEX. R. CIV. EVID. Rule 503 should be looked to for guidance in ascertaining whether or not a confidential communication between a client and his or her attorney is subject to the lawyer-client privilege when that privilege is timely raised as a basis for refusing to disclose the communication. As stated in R. R, Texas Law of Evidence Civil and Criminal, §421 (Texas Practice 3d ed. 1980), "[t]he oldest of the privileges for confidential communication is that for attorney and client." Professor Ray notes that the theory upon which this privilege rests is the necessity of removing any apprehension by the client of compulsory disclosure by the attorney in order to encourage freedom in consulting attorneys. Fifth, we endorse the hearing officer's use of an *in camera* inspection of documents sought to be excluded from discovery on the basis of the lawyer-client privilege.

We next consider appellant's primary contentions on appeal--that there was sufficient evidence introduced at the hearing to show that there was good cause and/or newly discovered evidence which would warrant the setting aside of the agreement signed at the first benefit review conference on October 21, 1991. Claimant's Exhibit No. 1 is a copy of a "Benefit Review Conference Agreement" dated October 21, 1991, signed by the benefit review officer, the respondent, and Ms. H. Ms. H signed the agreement in the signature space provided for the insurance carriers' signature. Two disputes with their agreed resolutions are noted in the agreement. The first dispute was whether temporary income benefits should be suspended. The resolution of that issue was "carrier agrees to resume temporary income benefits as of 10-22-91." The second disputed issue was whether treatment by Dr. P should be suspended. The resolution of that issue was "parties agree that Dr. P is the claimant's 2nd choice of doctor and is currently the treating physician. Parties agree claimant will be seen for a required medical examination with a doctor of carrier's choice."

Article 8308-1.03(3) defines "agreement" as the resolution by the parties to a dispute under this Act of one or more issues regarding an injury, death, coverage, compensability, or compensation. The term does not include a settlement. Article 8308-6.15 relating to resolution at a benefit review conference, provides in part in Subsection (a) that the benefit review officer must reduce to writing a mutual agreement resulting in the resolution of a disputed issue, and that the benefit review officer and each party (or the designated representative of the party) must sign the agreement. Subsection (b) provides as follows:

> (b)An agreement signed pursuant to this section shall be binding on the insurance carrier through the final conclusion of all matters relating to the claim, unless the commission or a court, on a finding of fraud, newly discovered evidence, or other good and sufficient cause, shall relieve the insurance carrier of the effect of such agreement."

A second benefit review conference was held on December 16, 1991. The issue which was raised but not resolved after that conference was: "whether or not the claimant's benefits should be reinstated according to the agreement reached at the previous benefit review conference." On December 19, 1991, the benefit review officer entered an interlocutory order which ordered appellant to pay temporary income benefits (to resume 10/22/91) and to provide medical benefits in compliance with the agreement of October 21, 1991.

At the contested case hearing, the hearing officer stated that the issue was "whether or not the claimant's benefits should be reinstated according to the agreement reached at the benefit review conference of 10-21-91." In his decision, the hearing officer ordered appellant to abide by the agreement and to pay medical and income benefits, after finding that a binding agreement was reached at the benefit review conference and concluding that appellant did not have good cause for failure to abide by the agreement.

In support of its contention that there is good cause or newly discovered evidence sufficient to set aside the agreement, appellant asserts that Dr. H was respondent's first choice of doctor and that he had previously released respondent to return to work and found no disability. Appellant contends that Dr. H's report had not been disclosed to it, so that it constitutes newly discovered evidence which would serve as a basis for setting aside the agreement. Appellant further asserts that the agreement would be impacted by respondent's alleged telephone call to appellant requesting she be allowed to change treating physicians. In addition, appellant asserts that a medical report from Dr. K dated November 22, 1991, which indicates respondent had reached maximum medical improvement constitutes good cause for setting aside the agreement. Finally, appellant contends that Ms. H, appellant's former attorney who attended the first benefit review conference and signed the agreement, was not allowed to question respondent and that she was given no choice but to sign the agreement.

According to the benefit review conference report of December 16, 1991, respondent claimed she was injured on (date of injury), while working for her employer, Holiday Inn, in (city), Texas. Her answers to interrogatories indicated she hurt her back on her first day of work. She testified that she moved to (city), Texas, in February 1991, and gave appellant notice of her move, but that she didn't notify appellant it was a permanent move. She also testified that her workers' compensation benefits had been suspended prior to the first benefit review conference. She testified that on October 17, 1991, while she was living in (city), a job offer in (city) was extended to her, presumably by her employer. She said no job was offered to her at the Holiday Inn in (city), or any place closer than (city). She said she signed the benefit review conference agreement and that Dr. P, the doctor identified in the agreement, is her treating physician. She further testified that after the agreement was made, Dr. P refused to treat her because appellant would not pay him. She also said she did not receive any money under the agreement until the interlocutory order was entered. She said after the order was entered she received income benefits through February 20, 1992, but the benefits were not paid on a weekly basis. She also said she tried to see Dr. P after the interlocutory order was issued, but the doctor's receptionist told her appellant would not pay for the visit.

Respondent introduced into evidence numerous documents in addition to a copy of the agreement and a copy of the interlocutory order. A TWCC form TWCC-21--Payment of Compensation or Notice of Refused/Disputed Claim dated October 17, 1991, indicated that compensation had been paid to respondent from January 19, 1991 to October 21, 1991, and that the reason for termination of payments was that respondent had been released to light duty. The notice also indicated that medical treatment at the direction of Dr. P was in dispute. A letter on Ramada Inn stationary (no connection was made between the Holiday Inn and Ramada Inn) from C Y to respondent dated October 17, 1991, revealed that an offer of employment purportedly within work restrictions set by respondent's physician was made to respondent. The location of the offered employment is not stated, but the letter came from the Ramada Inn, (city), Texas. All of the TWCC-21 forms noted the employer as

Holiday Inn, (city). We note that appellant does not contend on appeal that a *bona fide* offer of employment was made to respondent, or that, if it was, it could serve as a basis for a finding of good cause to set aside the agreement. We further note that the distance of an offered position from the employee's residence is one of the factors to be considered in determining whether a *bona fide* offer of employment has been made under Rule 129.5. A second TWCC-21 form dated January 2, 1992, indicated that on that date appellant paid income benefits to respondent for the period October 22, 1991, to November 21, 1991. The notice stated that payment was made in accordance with the interlocutory order. A third TWCC-21 form dated January 30, 1992, indicated that on that date respondent was paid income benefits, "under protest," for the period November 22, 1991, to February 20, 1992. In a response to respondent's interrogatory concerning Ms. H's authority to represent appellant at the first benefit review conference, appellant answered that Ms. H was retained to represent the carrier at the benefit review conference, and that carrier does not believe that the agreement reflects the level of authority.

Numerous medical reports and records were also introduced into evidence by respondent. Some of the same reports and records were introduced into evidence by appellant. Most, if not all, of the medical reports recited that respondent told the health care provider that her back injury occurred when she bent over while cleaning a motel room. These reports indicated the following:

1. Dr. H examined respondent on the date of her alleged injury, (date of injury), for complaints of pain in her lower back and right leg. An undated return to work/school slip from Dr. H indicated that respondent had been under his care since (date of injury), and that she would be able to return to work/school on January 22, 1991. In the comments/limitation section of the slip, Dr. H noted "Lumbar strain/sprain." Appellant asserts that this undated return to work slip is newly discovered evidence.

2. Respondent was admitted to All (Hospital) in (city) on January 24, 1991, for complaints of back pain. She was discharged on January 26, 1991, with a final diagnosis of "intractable lumbar pain" and "bladder incontinence." Dr. H was her attending physician at the hospital. At his request, Dr. H examined respondent at the hospital and diagnosed a lumbosacral strain.

3. Dr. P examined respondent on February 1, 1991, and diagnosed an injury to the lumbar area with bilateral radiculopathy. Dr. P's subsequent medical reports to the Commission in May, July, and September 1991, noted his referral of respondent to Dr. K for an evaluation. Dr. P also noted in his reports that it was "unknown" or "not known" when respondent could return to limited type work or when maximum medical improvement was anticipated.

4.Dr. K first examined respondent on March 20, 1991, and diagnosed "low back strain." His Initial Medical Report to the Commission dated March 20, 1991, stated that the visit was for an orthopedic consult at the request of Dr. P. In a letter dated October 17, 1991, Dr. K said he planned to release respondent to "light duty work" on October 22, 1991. Dr. Kramer stated that respondent would not be able to lift over 10 pounds, and that she was to do no stooping, squatting, bending, kneeling, climbing, going up or down stairs, or pushing or pulling.

In a report dated October 28, 1991, Dr. K released respondent from his care, but stated she was to continue medical care with Dr. P. He also noted that respondent was released to light duty work effective October 28, 1991.

In a letter to appellant's adjusting firm dated November 22, 1991, Dr. K stated that he did not feel physical therapy treatments for respondent were reasonable or necessary, that respondent's excessive weight was probably harmful to her recovery, that he felt that respondent had reached maximum medical improvement, that he felt she could be gainfully employed, and that he felt there had been no permanent disability resulting from her injury. His opinion as to maximum medical improvement was based on various diagnostic tests which had all been negative as to showing a nerve root compression problem. Dr. K noted in an earlier report of April 17, 1991, that appellant had agreed to pay the cost of a weight loss program for respondent.

In addition to medical reports and records, appellant introduced into evidence the oral depositions of J S and B H, along with copies of notations of telephone conversations made by Mr. S. Mr. S stated that he is a licensed adjustor and is employed by Gallegher Basset, appellant's adjusting firm. He said appellant insures respondent's employer for workers' compensation purposes. He testified that he told Ms. H to review the information before the first benefit review conference and that "we would like to see the benefits be discontinued because she has a release to light duty and that further treatment under Dr. P was not reasonable and necessary." He indicated that his position was based on Dr. K's medical reports. He testified he did not specifically instruct Ms. H to not enter into a benefit review conference agreement, but told her to contact him if she ran into any problems or had any questions. He did not recall discussing her authority to enter into an agreement. He said it was his understanding that Dr. K was respondent's primary physician, that Dr. K released respondent to light duty status with restrictions, and that the employer made a written *bona fide* offer of employment meeting those restrictions. He said he did not ask Dr. K if he was the "leading physician or designated physician." He testified he had concluded Dr. K was the treating physician based on respondent's contact with his office concerning changing physicians and respondent's visits to Dr. K throughout the fall. He said temporary income

benefits were not reinstated after receiving the benefit review conference agreement because other issues needed to be resolved. He said the temporary income benefits were reinstated retroactively on January 2, 1992, when he received the interlocutory order. He also said that after the first benefit review conference he came upon a medical report which showed that respondent had been seen by a physician that appellant did not know about and that that doctor had released her to return to work.

Notations of telephone calls with respondent, purportedly made by insurance adjustors working on her case, were introduced into evidence by appellant. These notations revealed that the adjustors were aware that Dr. P was treating respondent and that he had referred respondent to Dr. K for evaluation and treatment. There is no mention in these notations about respondent requesting a change of choice of doctor from Dr. P to Dr. K. Dr. K is mentioned only as a specialist to whom respondent was referred by Dr. P.

Ms. H stated in her oral deposition that she has been an attorney for three years and has been employed by a law firm engaged primarily in insurance defense work. She attended the first benefit review conference on behalf of appellant at the request of its adjusting firm. She said it was her first benefit review conference and that she didn't receive any instruction or direction of what she was to do or not to do from the adjusting firm prior to attending the benefit review conference. She also said that in the file material she received from the adjusting firm there were no limiting instructions as to what she should or should not do at the benefit review conference. She said the discussion at the conference concerned respondent's release to duty with restrictions, the availability of respondent's former job, and the connection between respondent's excessive weight and her disability. She also said that she knew that respondent had moved to (city) and that the offer of light duty was for a job in (city). She considered respondent's relocation to (city) a significant factor in assessing the issue of suspension of benefits on the basis of a light duty job offer in (city). She indicated that her rationale for entering into the benefit review conference agreement was that she thought the case was premature for setting a contested case hearing and that an independent medical examination of respondent was needed.

In regard to the parties' agreement that Dr. P was respondent's second choice of doctor and that he was respondent's treating physician, Ms. H explained that she didn't think she had a choice as to that agreement because the Commission had on file that Dr. P was the second choice of doctor and there was no request to change to a third doctor. She further explained she didn't think that she had any grounds to dispute that Dr. P was respondent's treating doctor. She was aware that Dr. P had referred respondent to Dr. K for a consultation. It was her understanding of the agreement that compensation benefits would be resumed and that respondent would have a medical examination by a doctor of the carrier's choice. She further stated that she assumed she had the authority to make the agreement. She also stated that respondent was unrepresented at the conference, that she attempted to get respondent to agree that Dr. K was her treating physician, but that the hearing officer would not allow that agreement to be made based upon the information he had.

In considering appellant's contention that Dr. H's release of respondent to return to work on January 22, 1991, was newly discovered evidence which would relieve appellant of the effect of the agreement, we look for guidance to court decisions on newly discovered evidence. In Jackson v. Van Winkle, 660 S.W.2d 807, 809 (Tex. 1983), the Supreme Court of Texas stated that:

> "It is incumbent upon a party who seeks a new trial on the ground of newly discovered evidence to satisfy the court first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is not cumulative; fourth, that it is so material that it would probably produce a different result if a new trial were granted. [citations omitted.] Whether a motion for new trial on the ground of newly discovered evidence will be granted or refused is generally a matter addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of discretion." [citation omitted.]

In our opinion, appellant failed to show that its failure to discover Dr. H's return to work slip prior to the first benefit review conference was not owing to its want of due diligence. The return to work slip was in existence since January 1991. With the exercise of due diligence, appellant should have discovered it before the October 1991 benefit review conference. Appellant paid Dr. H's medical bills and was certainly entitled to request reports of this nature. We also believe that appellant failed to demonstrate that the return to work slip would have probably produced a different result had it been produced at the first benefit review conference, considering that Dr. Kramer's opinion as to respondent's work limitations was much more recent.

In regard to Dr. K's medical report of November 22, 1991 (presupposing that this report constituted newly discovered evidence), we are of the opinion that the hearing officer did not abuse his discretion in concluding that the information in that report did not constitute good cause to relieve appellant from its agreement under the circumstances presented in this case. First, assuming that Dr. K's opinion that respondent had reached maximum medical improvement was a "certification" of maximum medical improvement under Rule 130.1, the overwhelming weight of the evidence showed that Dr. K was not respondent's treating doctor but was a referral doctor. Pursuant to Article 8308-4.64 a referral doctor does not constitute the selection of an alternate doctor for purposes of Article 8308-4.62. Thus, under Rule 130.3--Certification of Maximum Medical Improvement by Doctor Other Than Treating Doctor--Dr. K was required to send to Dr. P, respondent's treating doctor, a medical evaluation report under Rule 130.1 in order to obtain Dr. P's statement as to whether he agreed or disagreed with the finding of maximum medical improvement. There is no evidence in the record that Dr. K or appellant complied with Rule 130.3. Second, although Dr. K stated in his report that he felt respondent could be gainfully employed, there is no indication in the report that he had lifted the work restrictions set forth in his report of October

17, 1991. Thus, the information in the November 22nd report concerning respondent's employment status added nothing to what was already known by the parties at the time of their agreement. Third, Dr. K's comment in his report concerning respondent's excessive weight was brought out in Dr. K's earlier report of June 14, 1991, so such information also added little, if anything, to what the parties knew at the time of their agreement.

We also do not find merit in appellant's assertion that its former attorney "was given no choice but to sign the agreement," and its complaint as to the conduct of the benefit review conference. Ms. H was quite clear in stating that she believed she had authority to enter into the agreement on behalf of the appellant, and that she entered into the agreement on the basis of the information provided and argument made at the conference and not out of coercion of any sort. We note that Article 8308-10.07(b)(11) provides that it is an administrative violation for an insurance carrier or its representative to willfully or intentionally attend a dispute resolution proceeding within the Commission without complete authority or failing to exercise authority to effectuate agreement or settlement. Her testimony also revealed that the benefit review officer was carrying out his responsibility under Article 8308-6.13(a)(2) when he informed respondent, an unrepresented claimant, that Dr. P was her second choice of doctor according to Commission records.

For the foregoing reasons, it is our opinion that appellant has failed to show that the hearing officer abused his discretion in concluding that appellant did not have good cause for failing to abide by the October 21, 1991, agreement (Conclusion of Law No. IV). It is also our opinion that the hearing officer's finding that appellant entered into a binding agreement on October 21, 1991 (Finding of Fact No. VI), is supported by the evidence and is not against the great weight and preponderance of the evidence.

We next consider appellant's contention that Findings of Fact I through IX (with the exception of Finding of Fact VI which we have previously considered), and Conclusions of Law I through VI (with the exception of Conclusion of Law IV which we have previously considered) exceed the scope of the disputed issue at the hearing and are supported by "no evidence." We find that there was some evidence of probative value adduced at the hearing to support all of the challenged findings and conclusions. There is no contention that these findings and conclusions are against the great weight and preponderance of the evidence. We observe that Finding of Fact III (claimant sustained an injury on (date of injury), while at work), Finding of Fact IX (carrier did not obey the interlocutory order), Conclusion of Law III (claimant sustained an injury while in the course and scope of her employment), Conclusion of Law V (carrier does not have good cause for failure to abide by the interlocutory order), and Conclusion of Law VI (carrier and its representatives committed several acts or omissions in violation of the 1989 Act and Commission Rules) are superfluous since the only issue before the hearing officer was "whether or not the claimant's benefits should be reinstated according to the agreement reached at the benefit review conference." Accordingly, those findings and conclusions are not considered for purposes of this appeal. *See* Texas Workers' Compensation Commission Appeal No. 92113 (Docket No. FW-91-144699-01-CC-FW41) decided May 7, 1992. We also observe with regard to

Conclusion of Law VI, that administrative violation proceedings are held under the authority of Article 10, Chapter B, Subchapter 2 of the 1989 Act (Articles 8308-10.31 through 8308-10.35), and are conducted under the provisions of the Administrative Procedure and Texas Register Act and not in a benefit contested case hearing held under Article 6, Chapter D of the 1989 Act (Articles 8308-6.31 through 8308-6.34).

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Susan M. Kelley
Appeals Judge

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Stark O. Sanders, Jr.
Chief Appeals Judge